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In The

Supreme Court of the United States

October Term, 1994

RONALD W. ROSENBERGER, *et al.*,

Petitioners,

v.

THE RECTOR AND VISITORS
OF THE UNIVERSITY OF VIRGINIA, *et al.*,

Respondents.

On Writ Of Certiorari
To The United States Court Of Appeals
For The Fourth Circuit

BRIEF *AMICI CURIAE* OF CHRISTIAN LEGAL SOCIETY, CHRISTIAN LIFE COMMISSION OF THE SOUTHERN BAPTIST CONVENTION, FAMILY RESEARCH COUNCIL, HOME SCHOOL LEGAL DEFENSE ASSOCIATION, AND NATIONAL ASSOCIATION OF EVANGELICALS IN SUPPORT OF PETITIONERS

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39 pp

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF THE *AMICI* 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 1

ARGUMENT 3

I. The Conflict Between the Neutrality Principle and the No-Funding Principle Can Be Resolved by Underlying Principles of Religious Liberty and Substantive Neutrality 3

A. The Conflicting Principles 3

B. Substantive Neutrality: Maximizing Religious Liberty by Minimizing Government Influence 6

II. Substantive Neutrality Requires Funding for *Wide Awake* 9

A. Government Speech and Private Speech 9

B. Substantive Neutrality and Student Publications 10

III. The Policies of the No-Funding Principle Are Better Served by Universal Funding Than by Discriminatory Funding 13

A. Neutrality 14

B. Distortion of Religious Messages 15

C. Deliberate Assertions of Control 17

D. Voluntarism 19

TABLE OF CONTENTS – Continued

Page

IV. The Historical Controversies That Gave Prominence to the No-Funding Principle Yield No Principled Support for the University's Position 21

A. The General Assessment 21

B. Protestant-Catholic Conflict 23

CONCLUSION 29

TABLE OF AUTHORITIES

Page

CASES:

Abington School Dist. v. Schempp, 374 U.S. 203 (1963) 3, 9

Arkansas Writers' Project v. Ragland, 481 U.S. 221 (1987) 18

Board of Educ. v. Mergens, 496 U.S. 226 (1990) 9, 19, 21

Bowen v. Kendrick, 487 U.S. 589 (1988) 4

Bradfield v. Roberts, 175 U.S. 291 (1899) 4

Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217 (1993) 8

Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646 (1980) 4

County of Allegheny v. ACLU, 492 U.S. 573 (1989) ...3, 9

Everson v. Board of Educ., 330 U.S. 1 (1947) 3, 4, 22

FCC v. League of Women Voters, 468 U.S. 364 (1984) 18

Gay & Lesbian Students Ass'n v. Gohn, 850 F.2d 361 (8th Cir. 1988) 18

Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260 (1988) 18

Lamb's Chapel v. Center Moriches Union Free School Dist., 113 S. Ct. 2141 (1993) 3, 4

Lemon v. Kurtzman, 403 U.S. 602 (1971) 3, 4

Lynch v. Donnelly, 465 U.S. 668 (1984) 3

Roemer v. Board of Pub. Works, 426 U.S. 736 (1976) ...3, 4

Rosenberger v. Rector and Visitors of the Univ. of Virginia, 18 F.3d 269 (4th Cir. 1994) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Rust v. Sullivan, 500 U.S. 173 (1991) 18

Stone v. Graham, 449 U.S. 39 (1980) 9

Texas Monthly v. Bullock, 489 U.S. 1 (1989) 18

Wallace v. Jaffree, 472 U.S. 38 (1985) 3, 9

Walz v. Tax Comm'n, 397 U.S. 664 (1970) 5

Widmar v. Vincent, 454 U.S. 263 (1981) 3, 21

Witters v. Washington Dept. of Servs. for the Blind, 474 U.S. 481 (1986) 5

Zobrest v. Catalina Foothills School Dist., 113 S. Ct. 2462 (1993) 5

CONSTITUTIONAL PROVISIONS

Cal. Const. art. IX, § 8 24

N.Y. Const. art. XI, § 3 24

Tex. Const. art. 7, § 5(a) 24

LAW REVIEWS

Laycock, Douglas, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U.L. Rev. 1 (1986) 10

Laycock, Douglas, *Formal, Substantive and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993 (1990) 8

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TABLE OF AUTHORITIES – Continued

Page

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Bennett, David H., *The Party of Fear* (Univ. of N. Carolina Press 1988) 25

Glenn, Charles, *The Myth of the Common School* (1988) 23, 24, 26, 27

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Kaestle, Carl F., *Pillars of the Republic: Common Schools and American Society 1780-1860* (1983) 24, 25, 26

Kinzer, Donald L., *An Episode in Anti-Catholicism: The American Protective Association* (Univ. of Washington Press 1964) 25

Madison, James, *Memorial and Remonstrance Against Religious Assessments* 22

Ravitch, Diane, *The Great School Wars* (1974) .. 24, 25, 26

Richardson, James D., 7 *Messages and Papers of the Presidents* (1898) 26

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Stokes, Anson Phelps, 2 *Church and State in the United States* (1950) 24, 25, 26, 27

Symposium on *Faith and Reason*, 16 Thoughtlines No. 2 (Fall 1990) 11

TABLE OF AUTHORITIES – Continued

Page

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Zollman, Carl, *American Church Law* (1933) 24, 27

INTEREST OF THE *AMICI*

The interest of each *amicus curiae* is set forth in the appendix to this brief. The letters from the parties consenting to the filing of this brief have been filed with the Clerk of the Court.

STATEMENT OF THE CASE

Amici adopt the Statement of the Case in the Brief of Petitioners.

SUMMARY OF ARGUMENT

This case lies at the intersection of two familiar principles from the American tradition of religious liberty. Petitioners rely on the neutrality principle; respondents rely on the no-funding principle. These *amici* attempt to resolve the conflict in a non-arbitrary manner by examining the deeper principles and policies that underlie the positions of the parties.

Substantive neutrality, defined as minimizing government influence on religion, directly serves the ultimate goal of maximizing religious liberty for both believers and nonbelievers. The no-funding principle has often served this goal instrumentally, but on these facts it does not. The policies of the no-funding principle are better served by no funding or by universal funding; the worst possible policy is discriminatory funding, which is the University's policy.

This brief also examines the principal historical controversies that made the no-funding principle prominent in the American understanding of religious liberty. The general assessment proposal in 1784-85 would have funded only religious activities, thus violating both the neutrality and the no-funding principles. The University's discriminatory funding of non-religious and anti-religious speech is in some ways the mirror image of the general assessment; neutral funding of all viewpoints would be better than discriminatory funding of either side.

The other great historical precedent is nineteenth-century Catholic complaints about the Protestant establishment in public schools and the corresponding movement to ban funding of Catholic schools. Nativist Protestants convinced themselves that Protestant religious observances in the public schools were neutral, but that Catholic schools were sectarian. The University has committed an analogous fallacy in claiming that its subsidy of non-religious and anti-religious speech is neutral, and that funding *Wide Awake* would be a forbidden support for religion.

ARGUMENT

I. The Conflict Between the Neutrality Principle and the No-Funding Principle Can Be Resolved by Underlying Principles of Religious Liberty and Substantive Neutrality.

A. The Conflicting Principles.

This case lies at the intersection of two familiar principles from the American tradition of religious liberty. The neutrality principle directs that government be neutral toward religion,[1] neither "advanc[ing] nor inhibit[ing]" religion.[2] Government may not endorse religion, but neither may it "disapprove" religion[3] or endorse the view that religion is wrongheaded or irrelevant.

Because we are here dealing with speech, the neutrality principle of the Religion Clauses is reinforced by the content neutrality and viewpoint neutrality principles of the Free Speech Clause.[4] *Wide Awake* has published

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[1] *See, e.g.*, County of Allegheny v. ACLU, 492 U.S. 573, 592-94 (1989); Roemer v. Board of Pub. Works, 426 U.S. 736, 745-47 (1976) (plurality opinion); Abington School Dist. v. Schempp, 374 U.S. 203, 215, 222, 225-26 (1963); Everson v. Board of Educ., 330 U.S. 1, 18 (1947).

[2] Lemon v. Kurtzman, 403 U.S. 602, 612 (1971).

[3] Wallace v. Jaffree, 472 U.S. 38, 56 n.42 (1985), quoting Lynch v. Donnelly, 465 U.S. 668, 690 (1984) (O'Connor, J., concurring).

[4] *See, e.g.*, Lamb's Chapel v. Center Moriches Union Free School Dist., 113 S. Ct. 2141 (1993); Widmar v. Vincent, 454 U.S. 263 (1981).

Christian perspectives on racism, sexuality, eating disorders, economic policy, and other contemporary issues.[5] These facts thus illustrate once again what the Court unanimously recognized two years ago: religion is not only a subject matter, but also a source of viewpoints on a wide range of contemporary issues.[6]

A second principle, equally familiar, is the no-funding principle: government generally should not fund religious functions.[7] Government may sometimes fund secular functions performed by religious organizations,[8] but those cases are no precedent for funding religious functions. There is no dispute that the speech to be funded here is religious and that it falls within the natural scope of the no-funding principle.

The neutrality and no-funding principles have generally seemed to be consistent, and the Court has only occasionally been forced to choose between them. When the Court has been forced to choose, the neutrality principle has prevailed. The clearest example is the Court's unanimous holding that state scholarships for the blind

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[5] Rosenberger v. Rector and Visitors of the Univ. of Virginia, 18 F.3d 269, 272-73 & n.7 (4th Cir. 1994).

[6] *Lamb's Chapel*, 113 S. Ct. at 2147-48.

[7] *See, e.g.*, Lemon v. Kurtzman, 403 U.S. 602, 619 (1971); Everson v. Board of Educ., 330 U.S. 1, 16 (1947).

[8] *See e.g.*, Bowen v. Kendrick, 487 U.S. 589, 608-09 (1988) (sex education); Committee for Pub. Educ. & Religious Liberty v. Regan, 444 U.S. 646, 657-59 (1980) (administration of mandatory testing and monitoring of student attendance); Roemer v. Board of Pub. Works, 426 U.S. 736 (1976) (cash grants to colleges and universities); Bradfield v. Roberts, 175 U.S. 291 (1899) (medical care).

may be applied to the purely religious program of studying for the ministry in a Bible college.[9] Somewhat analogously, the Court has held that property committed to religious uses may be exempted from taxation pursuant to a neutral scheme of tax exemption for a wide range of secular and religious organizations.[10] And no one has ever brought an Establishment Clause challenge to the income-tax deductibility of contributions to religious organizations. These deductions are not mere tax exemptions; they offset tax that would be due on the taxpayer's salary and investment income. They are therefore like a matching grant to the taxpayer for every contribution. The justification must be that religious contributions are neutrally included in a broad range of contributions to analogous organizations, and that the neutrality principle controls over the no-funding principle.

Here the two principles squarely conflict. The University of Virginia funds a class of student publications that naturally includes religious publications. The neutrality principle forbids the discriminatory exclusion of religious publications. But the University argues, and the Court of Appeals held, that including the religious publications would violate the no-funding principle.

The ultimate question presented is thus to specify the relationship between these conflicting principles in the

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[9] Witters v. Washington Dept. of Servs. for the Blind, 474 U.S. 481 (1986). *See also* Zobrest v. Catalina Foothills School Dist., 113 S. Ct. 2462 (1993) (holding that state-paid sign language interpreter for the deaf may be used at Catholic high school to translate both secular and religious instruction).

[10] Walz v. Tax Comm'n, 397 U.S. 664, 672-73 (1970).

context of religious speech. Are the neutrality principles of the Religion and Speech Clauses subordinate to the no-funding principle, as the Court of Appeals assumed? Or is it the other way around, as this Court has held in other contexts? Or is there some underlying principle that unites these principles and makes their relationship clear?

B. Substantive Neutrality: Maximizing Religious Liberty by Minimizing Government Influence.

There is such an underlying principle. The ultimate goal of the Religion Clauses is religious liberty for all – for believer and nonbeliever, for Christian and Jew, for Protestant and Catholic, for Western traditions and Eastern, for large faiths and small, for atheist and agnostic, for secular humanist and the religiously indifferent, for every individual human being in the vast mosaic that makes up the American people. The ultimate goal is that every American should be free to hold his own views on religious questions, and to live the life that those views direct, with a minimum of government interference or influence.

The neutrality principle serves this ultimate goal directly. By forbidding government to take positions on religious questions, the neutrality principle minimizes government influence on religious choice, and thus leaves maximum room for private influence and private choice.

The no-funding principle serves this ultimate goal instrumentally. Government money is a powerful source of government influence; government expenditures on

religion generally expand government influence in a field where that influence should be minimized. Describing the same point from the private perspective, voluntary funding of religious organizations generally maximizes individual liberty and the influence of private choice. Each individual can decide when, how, and how much to contribute to whom, and whether to contribute at all. Voluntary funding of religious organizations protects individual conscience and keeps government out of religion.

These themes of liberty, neutrality, and voluntarism can be integrated into a single standard of substantive neutrality:

> [S]ubstantive neutrality [means] this: the religion clauses require government to minimize the extent to which it either encourages or discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance. . . . [R]eligion should be left as wholly to private choice as anything can be. It should proceed as unaffected by government as possible. . . .
>
> This elaboration highlights the connections among religious neutrality, religious autonomy, and religious voluntarism. Government must be neutral so that religious belief and practice can be free. The autonomy of religious belief and disbelief is maximized when government encouragement and discouragement is minimized. The same is true of religious practice and refusal to practice. The goal of maximum religious liberty can help identify the baseline from

which to measure encouragement and discouragement.[11]

This elaboration of substantive neutrality synthesizes seemingly separate strands in the American tradition of religious liberty. It attempts to clarify this Court's traditional emphasis on neutrality, to defend that emphasis against academic critics,[12] and to show how neutrality relates to liberty and to voluntarism. This synthesis points the way to a principled resolution here, where each side relies on a different strand from the religious liberty tradition.

This definition of substantive neutrality contrasts with formal neutrality, the mere absence of religious classifications.[13] The University's policy obviously violates formal neutrality, because it expressly defines "religious activities" as a basis for adverse treatment. These *amici* think it more significant that the University's policy also violates substantive neutrality.

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[11] Douglas Laycock, *Formal, Substantive, and Disaggregated Neutrality Toward Religion*, 39 DePaul L. Rev. 993, 1001-02 (1990).

[12] *See, e.g.*, Steven D. Smith, *Symbols, Perceptions, and Doctrinal Illusions: Establishment Neutrality and the "No Endorsement" Test*, 86 Mich. L. Rev. 266 (1987). Professor Smith urged the Court to abandon "the illusion that substantive answers can be deduced from the formal idea of neutrality." *Id.* at 331-32. Substantive neutrality moves beyond a mere "formal idea"; it defines "neutrality" in terms of the underlying substantive policies of the Religion Clauses.

[13] *See* Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 113 S. Ct. 2217, 2241-42 (1993) (Souter, J., concurring); Laycock, *supra* note 11, at 999-1006.

The ultimate goal is to maximize religious liberty for believers and nonbelievers alike. The no-funding principle is instrumental – it serves religious liberty under a familiar range of circumstances. But refusal of funding does not serve religious liberty under present circumstances at the University of Virginia.

II. Substantive Neutrality Requires Funding for *Wide Awake*.

A. Government Speech and Private Speech.

The most basic distinction in this case is between religious speech by private citizens and religious speech by government. "[T]here is a crucial difference between *government* speech endorsing religion, which the Establishment Clause forbids, and *private* speech endorsing religion, which the Free Speech and Free Exercise Clauses protect."[14] Private citizens are free to take any position on religious matters; they are under no obligation to remain neutral. But religious speech by government is forbidden or severely restricted. "The Establishment Clause, at the very least, prohibits government from appearing to take a position on questions of religious belief . . . "[15] Government must maintain its neutrality toward religion either by silence on the subject, or by carefully balanced comments, as in a course on comparative religion.[16]

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[14] Board of Educ. v. Mergens, 496 U.S. 226, 250 (1990).

[15] County of Allegheny v. ACLU, 492 U.S. 573, 593-94 (1989).

[16] *See, e.g.*, Wallace v. Jaffree, 472 U.S. 38, 60-61 (1985); Stone v. Graham, 449 U.S. 39, 41-42 (1980); Abington School Dist. v. Schempp, 374 U.S. 203, 225 (1963).

Both the protections for private speech and the restrictions on government speech follow from the neutrality principle:

> The government must be neutral both in its own speech and in its treatment of private speech. It may not take a position on questions of religion in its own speech, and it must treat religious speech by private speakers exactly like secular speech by private speakers.[17]

In a mixed economy, the line between government and the private sector is sometimes difficult to discern. But the task cannot be avoided; the distinction between private and governmental practice of religion is fundamental to the Religion Clauses. The line need not be drawn arbitrarily, or on the basis of a sterile debate over definitions. The principle of substantive neutrality – the ultimate goal of maximizing religious liberty and minimizing government influence on religion – can provide a reasoned basis for drawing the line in close cases.

B. Substantive Neutrality and Student Publications.

The University of Virginia has chosen to enhance private speech by subsidizing student publications. The University is not promulgating any message of its own; indeed, it carefully insists that its funding of student organizations does not mean that it "approves" of the

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[17] Douglas Laycock, *Equal Access and Moments of Silence: The Equal Status of Religious Speech by Private Speakers*, 81 Nw. U.L. Rev. 1, 3 (1986).

organizations, their activities, or their publications.[18] These publications are not government speech in pursuit of some legitimate government interest. The only government interest is to neutrally enhance the quantity of serious discussion on the campus.

Unfortunately, the University is enhancing private speech in a decidedly non-neutral way. It enhances a wide range of non-religious and anti-religious speech, but it does not enhance religious speech. It paid to print anti-Christian satires in *The Yellow Journal*,[19] it paid to print a range of views on "Faith and Reason" in *Thoughtlines*,[20] and it pays to print secular perspectives on a wide range of issues in fifteen different publications.[21] But it will not pay to print a Christian perspective on many of the same issues in *Wide Awake*. It thus discriminates between different viewpoints about religion; it also discriminates between religious and secular viewpoints on contemporary social issues. There is more non-religious and anti-religious speech on the campus than there would be without the University's enhancement. The University

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[18] *Rosenberger*, 18 F.3d at 270-71.

[19] *See A Christmas Story*, 1 Yellow Journal No. 2; Andrew "Schnoogums" Wallace, *Dick Hickner, Bully for Christ*, 1 Yellow Journal No. 3 at 14-15.

[20] *See* Symposium on *Faith and Reason*, 16 Thoughtlines No. 2 (Fall 1990).

[21] The funding of these publications, including *Thoughtlines* and *The Yellow Journal*, is in the record. *See Rosenberger*, 18 F.3d at 271 & n.3. The Court can read these publications as it would read any other. For convenience, *amici* will attempt to have copies of the publications lodged with the Clerk.

has interfered with the free flow of debate in the private sector, tilting the balance against religious views.

If the University were spending equivalent sums to disseminate its own anti-religious messages, or its own claim that non-religious viewpoints exhaust the range of debate on contemporary social issues, the constitutional violation would be clear. The University's discriminatory subsidy of private speech is analogous to these clear violations, although it is not identical because the University does not lend its own name and credibility to the private messages that it subsidizes. A closer analogy would be this: Suppose the University spent equivalent sums to publish anti-religious messages, or messages urging students to give thoughtful consideration "to the full range of secular viewpoints" on important issues, but it published this propaganda anonymously. Even though the University's name was not attached, this commitment of public funds to reduce the influence of religion would surely be unconstitutional. The University cannot itself take positions on religious questions, or work to exclude religious viewpoints from public debate; neither can it do so indirectly by subsidizing some private viewpoints and not others. If the University subsidizes private speech, it must do so without regard to viewpoint.

A fatal inconsistency lies at the heart of the University's position. The University in effect contends that when it subsidizes non-religious or anti-religious speech, that speech remains private, so that the University has not opposed or marginalized religion. But when it subsidizes religious speech, that speech becomes public, so that the University is supporting religion and violating the Establishment Clause.

The Court of Appeals made an equivalent error: "[I]t would be difficult to view awarding . . . monies to *Wide Awake* as anything but state sponsorship – and therefore advancement – of religious belief."[22] But if this be true, then it must be equally true that awarding money to *The Yellow Journal* is state sponsorship of anti-religious belief, and therefore "inhibition" of religion. Neither the Court of Appeals nor the University can have it both ways.

The University can subsidize the full range of student speech, or it can subsidize no student speech. Or it can subsidize only that student speech that it is willing and legally able to sponsor as an official university publication. Or it can subsidize publications selected on some neutral criterion, such as those publications that serve the largest number of students. But it cannot subsidize private publications selected in whole or in part on the basis of viewpoint. It cannot subsidize only non-religious and anti-religious speech any more than it could subsidize only religious speech.

III. The Policies of the No-Funding Principle Are Better Served by Universal Funding Than by Discriminatory Funding.

The no-funding principle is not an end in itself; it is a means to the end of religious liberty. In a wide range of circumstances, government funding of religious functions threatens religious liberty. Compliance with the no-funding principle generally reduces government influence on the climate of religious opinion, and thus conduces to

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[22] *Rosenberger*, 18 F.3d at 285.

compliance with the neutrality principle. Discretionary funding decisions can distort religious missions; religious groups may tailor their message to qualify for funding. Government is more likely to assert improper control over religious functions if it funds them. And many taxpayers object to being forced to support religious opinions involuntarily, and especially to supporting religious opinions with which they disagree.

Under the current rules at the University of Virginia, one of these reasons for the no-funding principle is of little weight, and the rest have actually become arguments for further funding. We will consider each of these reasons in turn, but the general point is this: The University has already breached the no-funding rule and run afoul of all its policies. The University only makes matters worse by trying to fund some private opinions and not others. The only way to achieve the policies of the no-funding rule is to fund nobody or everybody – to abandon the Student Activities Fund entirely, or to abandon the exclusion of religious views.

A. Neutrality.

The University has not refrained from influencing the climate of religious opinion. Rather, as described above, it is directing its money and influence against religion. It is already flouting the neutrality principle. Because it is already funding non-religious and anti-religious speech, funding religious speech as well would bring it back into compliance with the neutrality principle.

B. Distortion of Religious Messages.

Similarly, it is the University's current policy that requires discretionary decisions that distort religious messages. The University's conception of a "religious activity" is ill-defined, and administered in the first instance by inexperienced undergraduates. The Muslim Students Association, which sponsors speakers and publishes a magazine, is funded.[23] The Jewish Law Students Association, which exists to "encourage Jewish law students to participate in Jewish activities," is funded.[24] The C.S. Lewis Society, which promotes discussion of "literary, moral, and philosophical topics, with a particular emphasis on the work of the 'Oxford Christians,' "[25] is funded – because, the University says, it does not proselytize.[26] Black Voices was funded in 1990-91, when it sang "gospel music as a Black cultural activity," but not in 1991-92, when it began "evangelizing as a religious group."[27] *Wide Awake* is not funded, apparently because it takes its Christianity too seriously.[28]

There is a clear message to the Muslim Students, the Jewish Law Students, the C.S. Lewis Society, and any other religious student groups that may need or desire University funding. They may be funded so long as they keep their religious message muted. They may be funded

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[23] Jt. App. 89.

[24] *Id.* at 97.

[25] *Id.* at 104.

[26] See Brief of Appellees in Court of Appeals at 16 n.7.

[27] *Id.*

[28] *Id.*

if they claim to discuss religion as a cultural artifact and not as a living belief system. Or perhaps they may be funded if they discuss their religion among themselves and do not try to share it with anyone else. The line is not clear; they had best play it safe. These groups can evolve only on lines acceptable to the University, unless they are able and willing to give up their funding. There is an equally clear message to *Wide Awake* and Black Voices: if you really need funding, tone down your message, disguise yourselves as cultural, and apply again next year.

This is exactly the problem the no-funding rule is designed to avoid. The problem is inherent once the University begins to fund a wide range of student groups. The problem would not be avoided by pushing the line back and excluding even more religious speech. That would aggravate the anti-religious discrimination in the system, but it would not relinquish the University's control over groups that need or desire funding. Some places to draw the line may be clearer than others, but wherever the University draws the line, it will be controlling the student groups that fall near it.

Once the University undertakes the business of subsidizing student speech, the only way to avoid control and to approximate neutrality is to fund all student speech, including religious speech, without regard to viewpoint. If there are not enough funds for all that apply, the selection criteria should be unrelated to viewpoint and as objective and nondiscretionary as possible. Funding some viewpoints but not others maximizes control; on these facts, expanding funding would relinquish control.

C. Deliberate Assertions of Control.

The distortion of religious messages under the current program is the natural result of the University's effort to enforce its discriminatory eligibility criteria. Eliminating the discriminatory criteria would largely solve that problem. But a related risk would remain: when government pays the bills, it is more likely to assert control. The University may at some point demand the right to edit or censor funded student publications.

This is a political risk that may or may not come to pass; it is not an inherent or inevitable consequence. The risk is present for all the groups currently funded, and the University has structured the program to minimize the risk. It has stated that it does not control or approve the activities of any funded group,[29] and so far as this record shows, it has kept its word.

If the University succumbed to the temptation to exercise control, it would fundamentally change the nature of the program. The purpose of the Student Activity Fund is not to promulgate the University's message; its only purpose is to enhance student voices and activities. Thus, the current structure of the program provides substantial political protection against University control.

Moreover, so long as the program is structured in this way, there is legal protection against University control. So long as the University merely subsidizes private speech – that is, until and unless it says that subsidized student groups genuinely speak for the University and

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[29] *Rosenberger*, 18 F.3d at 270-71.

deliver the University's message – it cannot legally censor their speech.[30]

If the University were to assert sponsorship and control over funded programs, everything about this case would change. Many fewer student groups would be funded; the University could not in good faith adopt as its own all the disparate messages of the 118 groups currently funded. Certainly it could not adopt inconsistent messages as its own. No group would have a free speech right to have its message adopted as the University's message. The University could not adopt religious messages as its own, but neither could it adopt anti-religious messages as its own. The neutrality principle of the Religion Clauses would continue to bind, but the University would have to comply by taking no position

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[30] *Compare* FCC v. League of Women Voters, 468 U.S. 364, 399-401 (1984) (holding that cash subsidy to public television stations does not empower government to bar editorials on those stations); *with* Rust v. Sullivan, 500 U.S. 173, 192-200 (1991) (holding that when government pays private contractors to implement a government program, it can define the scope of the program and insist that no government money be diverted to other purposes); Hazelwood School Dist. v. Kuhlmeier, 484 U.S. 260, 267-73 (1988) (holding that school could reasonably control content of school-sponsored newspaper produced in journalism class); *see also* Texas Monthly v. Bullock, 489 U.S. 1 (1989) (striking down tax exemption that discriminated between religious and secular publications); Arkansas Writers' Project v. Ragland, 481 U.S. 221, 227-32 (1987) (striking down tax exemption that discriminated on basis of content of magazines). In the lower courts, this Court's principle that government cannot censor subsidized private speech has been applied to subsidized student organizations. *See, e.g.*, Gay & Lesbian Students Ass'n v. Gohn, 850 F.2d 361 (8th Cir. 1988).

on religious questions. Given the University's history of discrimination against religious viewpoints, any claim that it had closed the forum and adopted all messages as its own should be closely scrutinized for continued discrimination in actual practices. *See, e.g., Mergens*, 496 U.S. at 246. But if the University bona fide quit funding any messages other than its own, the neutrality principle and the no-funding principle would then point to the same result.

Thus there is a real and recognizable difference between the University's own speech and a University subsidy for a wide range of student organizations whose speech retains its constitutionally protected status as private speech. This difference means that the risk that the University will assert control is manageable. Under the current program, there are structural, political, and constitutional safeguards against improper assertions of control. Whatever risk remains is modest, and constitutionally far preferable to the gross departure from neutrality in the current distribution of funding.[31]

D. Voluntarism.

The presumptive no-funding principle also protects religious liberty by implementing the voluntarism principle. One application of the voluntarism principle is that taxpayers should not be forced to pay for religion, and especially other people's religion, with tax dollars. Here,

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[31] The distinction between government speech and subsidized private speech is also the central reason why the government's support of its own public schools does not oblige it to fund private schools.

the taxpayers are students who pay a student activity fee of $14 per semester.[32]

But the voluntarism principle was breached long ago, and universal funding would make things better instead of worse. Students at the University of Virginia are already forced to support opinions about religion with which they disagree. Christian students are forced to support *The Yellow Journal*, which openly mocks Christianity. Christian, Hindu, Buddhist, and atheist students are forced to support the Muslim and Jewish student organizations, which reject the central tenets of Christianity and other faiths and belief systems on campus. Evangelical Christians are forced to support the C.S. Lewis Society, which emphasizes rather different lessons from Christianity than those emphasized by *Wide Awake*, and the Lesbian and Gay Student Union,[33] which promotes a very different view of human sexuality than *Wide Awake*.

Nondiscriminatory funding would improve this situation in two related ways. First, it would distribute the burden evenly. As it stands now, students of all faiths and viewpoints must contribute to the fund, but only some faiths and viewpoints can draw from the fund. Nondiscriminatory funding would end that imbalance. Everyone would have to support some things he disagreed with, but it would also be more likely that everyone could find some group that gave him his $14 worth.

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[32] *Rosenberger*, 18 F.3d at 270.

[33] Jt. App. 65.

Second, nondiscriminatory funding would provide a neutral and secular rationale for the whole program. Students would no longer be taxed merely to support certain viewpoints; they would no longer be taxed merely to support non-religious and anti-religious speech. Rather, they would be taxed to neutrally enhance the full range of speech. "The provision of benefits to so broad a spectrum of groups is an important index of secular effect."[34] Similarly, it "would have a secular purpose and would avoid entanglement with religion."[35]

IV. The Historical Controversies That Gave Prominence to the No-Funding Principle Yield No Principled Support for the University's Position.

The no-funding principle looms large in the American tradition of religious liberty because of two historical controversies of great importance. These controversies are a source of understanding of the principle's scope and rationale.

A. The General Assessment.

Financing of churches was the central church-state issue of the 1780s, and immediate background to the adoption of the Establishment Clause in 1791. The single most famous American statement on disestablishment,

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[34] Widmar v. Vincent, 454 U.S. 263, 274 (1981), quoted with approval in Board of Educ. v. Mergens, 496 U.S. 226, 248 (1990) (plurality opinion).

[35] *Widmar*, 454 U.S. at 270-71; *Mergens*, 496 U.S. at 248, 252-53 (plurality opinion).

James Madison's *Memorial and Remonstrance Against Religious Assessments*, was written in opposition to the general assessment bill in the Virginia legislature, which would have provided tax support for teachers of the Christian religion.[36] If history settles anything in this area, it is that a general assessment would be unconstitutional.

But this case is not about a general assessment; indeed, nothing like the general assessment has been seriously proposed since repeal of the Massachusetts establishment in 1833. In the typical modern dispute about funding religious organizations, the state claims that it is funding some secular function performed by the church; those who object to funding claim that the function is really religious or that the secular function is insufficiently insulated from religious functions. And whether the function to be funded is religious or secular, modern funding programs always include both secular and religious organizations.

In sharp contrast, the general assessment was a tax solely for the support of clergy in the performance of their religious functions. The assessment was "general" only in the sense that all Christian faiths were included. There were no significant numbers of non-Christians in the polity, so the assessment was effectively neutral among religions then represented in Virginia.

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[36] Both the *Memorial and Remonstrance* and the general assessment bill are reprinted in Everson v. Board of Educ., 330 U.S. 1, 63-74 (1947) (appendix to opinion of Rutledge, J., dissenting).

However, it was not neutral as between religion and non-religion. The reason for supporting religious functions was not that they fell within the neutrally-drawn boundaries of some larger category of activities to be supported by the state. Rather, religion was to be singled out for special support because the state deemed it to be of special value.

The essence of *Wide Awake*'s claim to be included in the Student Activities Fund is to end discrimination between religious and non-religious viewpoints. But the essence of the general assessment was massive discrimination in favor of religious viewpoints: in a time of minimal government, religious viewpoints were to be singled out for a special subsidy. The no-funding principle as applied to the general assessment was fully consistent with the neutrality principle. But the no-funding principle as applied to *Wide Awake* is fundamentally inconsistent with the neutrality principle. Rejection of the general assessment is no precedent for refusing to fund *Wide Awake*.

B. Protestant-Catholic Conflict.

The other great controversy that gave prominence to the no-funding principle was the nineteenth-century dispute over common schools. Over a period of decades, and amidst great controversy, Americans built up the public schools and withdrew funding from religious schools.[37]

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[37] For accounts of these developments and the associated controversies, see Charles Glenn, *The Myth of the Common School* (Univ. of Mass. Press 1988); James Hennesey, *American Catholics:*

Thirty-two states adopted constitutional provisions expressly prohibiting public funding of religious schools.[38]

This controversy, the details of which have been largely forgotten, is the source of the tradition that school funding is an especially important issue in the separation of church and state. And the continuing disputes over that issue are a principal source of the sense that "direct monetary subsidization . . . is a beast of an entirely different color"[39] – distinguishable from access to facilities and other rights subject to the neutrality principle.

The nineteenth-century resolution of the school-funding controversy arguably represents a political judgment on the constitutional questions raised by such funding. But there are difficulties with relying on that political judgment, even with respect to schools. It is especially dangerous to abstract from that judgment a bright-line rule that applies to all contexts and overrides competing principles of religious neutrality and freedom of speech. It is dangerous to reason from premises derived from an

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A History of the Roman Catholic Community in the United States 182-83, 185-86 (Oxford Univ. Press 1981); Carl F. Kaestle, *Pillars of the Republic: Common Schools and American Society 1780-1860* (Hill & Wang 1983); Diane Ravitch, *The Great School Wars* 3-76 (Basic Books 1974); Anson Phelps Stokes, 2 *Church and State in the United States* 47-72, 642-54, 681-86, 722-28 (Harper Bros. 1950).

[38] For a list, see Carl Zollman, *American Church Law* §§ 65-66 at 78-80 (West 2d. ed. 1933). For additional background, see Glenn, *supra* note 37, at 251-53. For examples, see Cal. Const. art. IX, § 8; N.Y. Const. art. XI, § 3; Tex. Const. art. 7, § 5(a).

[39] *Rosenberger*, 18 F.3d at 286.

old dispute without examining the dispute and the premises.

One difficulty with reasoning from nineteenth-century rejection of funding for religious schools is that that rejection was not part of the background to the First Amendment. And although the movement against funding religious schools amended many state constitutions, it conspicuously failed in its attempt to amend the federal Constitution.[40]

Perhaps more important, the nineteenth-century movement was based in part on premises that were utterly inconsistent with the First Amendment. Although there were good arguments to be made on both sides, the nineteenth-century opposition to funding religious schools drew heavily on anti-Catholicism. Nativist opposition to Catholic immigration fluctuated after 1825, but it never disappeared. Anti-Catholic secret societies, such as the Know Nothings and the American Protective Association, occasionally grew large enough to influence elections,[41] and there was occasional mob violence and burnings of Catholic churches and convents.[42]

The movement for a federal constitutional amendment began with President Grant's 1875 warning against

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[40] See *infra* at 27.

[41] *See, e.g.*, David H. Bennett, *The Party of Fear* 105-16, 159-82 (Univ. of N. Carolina Press 1988); Donald L. Kinzer, *An Episode in Anti-Catholicism: The American Protective Association* 140-80 (Univ. of Washington Press 1964); 1 Stokes, *supra* note 37, at 825-38.

[42] Kaestle, *supra* note 37, at 170; Ravitch, *supra* note 37, at 36, 66, 75; 1 Stokes, *supra* note 37, at 817-22, 824, 830-31.

a potential national conflict "between patriotism and intelligence on the one side, and superstition, ambition and ignorance on the other."[43] In context, there is no doubt that the feared source of "superstition, ambition and ignorance" was the Roman Catholic Church, rapidly growing from immigration, with its alleged papal conspiracy to dominate the country. The preventive that the President proposed was to "[e]ncourage free schools and resolve that not one dollar of money appropriated to their support, no matter how raised, shall be appropriated to the support of any sectarian school."[44]

Catholics argued that Protestant religious practices in the public schools made those schools as sectarian as any private school. Public schools commonly read the King James Bible ("the Protestant Bible") "without note or comment."[45] Catholics noted that "the reading of the Scriptures as a public ceremony is as distinctive to them [Protestants], as the celebration of Mass would be to Catholics."[46]

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[43] Speech to the Army of the Tennessee (Sept. 29, 1875) (manuscript and typescript in the Ulysses S. Grant Papers in the Library of Congress; reproduced on reel 5 of the microfilm edition).

[44] *Id.* The President requested a constitutional amendment to this effect in his Annual Message to Congress (Dec. 7, 1875), reprinted in James D. Richardson, 7 *Messages and Papers of the Presidents* 332, 334 (1898).

[45] For accounts of the Protestant Bible controversy, see Glenn, *supra* note 37, at 196-204; Kaestle, *supra* note 37, at 98-99, 166-71; Ravitch, *supra* note 37, at 3-76; 1 Stokes, *supra* note 37, at 825-32.

[46] *The President's Speech at Des Moines*, 22 Catholic World 433, 438 (1876).

Senator James G. Blaine proposed a constitutional amendment to implement the President's proposal. The Blaine Amendment would have codified the Protestant position by expressly permitting Bible reading in the public schools but forbidding any use of state or federal funds to support religious schools.[47] This amendment was narrowly defeated by Democrats in the Senate; one of Blaine's supporters later denounced the Democrats as "the party of Rum, Romanism, and Rebellion."[48]

Whatever the merits of the tradition against state funding for church-affiliated schools, its origin was not a proud moment in our constitutional history. These nineteenth-century debates did not produce a principled resolution to a difficult problem. Badly tainted by anti-Catholicism, they produced instead a Nativist Protestant victory over Catholic immigrants. There was only a pretense of neutrality; the end result sustained a Protestant establishment in the public schools at public expense, with no relief for religious minorities. Major Jewish groups responded with their long effort to secularize the public schools;[49] Catholics continued their long effort to build and finance private schools. In modern times, the Court has struggled with the difficult issues raised by the combination of secular and religious functions in church-

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[47] For the text of the amendment with discussion, see Glenn, *supra* note 37, at 252-53; 2 Stokes, *supra* note 37, at 68-69, 722-28; Zollman, *supra* note 38, § 62 at 75-76.

[48] See Arthur Schlesinger, ed., *History of American Presidential Elections 1789-1968* at 1606 (Chelsea House 1971).

[49] See Jonathan D. Sarna, *American Jews and Church-State Relations* 14-31 (American Jewish Committee 1989).

affiliated schools, and those issues are of course not presented here.

The University's position is essentially analogous to the position of the nineteenth-century Nativist Protestants. The University is far more inclusive, but it makes the same analytic error with respect to the groups it excludes. The University includes in its funding program non-religious, anti-religious, and even mutedly-religious voices. It excludes other religious voices. And it proclaims the program neutral and takes offense when the excluded voices object to its discrimination. The essential nature of the problem is not changed by whose ox is gored. It is irrelevant that anti-religious voices are now favored instead of disfavored, or that Protestant voices are now disfavored instead of favored. Discrimination in any direction violates the University's obligation of substantive neutrality toward religion.

In an activist state with a mixed economy, there will arise many different issues concerning neutrality and funding, and different factual contexts will require different solutions. This Court must reason such issues out from first principles; we have tried to assist that process in the first three parts of this brief. The relevance of the nineteenth century Protestant-Catholic conflict is principally as a warning not to beg questions. The Court should not unwittingly reason from a premise rooted in nineteenth-century anti-Catholicism.

CONCLUSION

The central command of the Religion Clauses is that government should minimize its influence on religious belief and practice. The University has violated that command. It has spent its funds to enhance private speech in discriminatory ways, distorting private debate in a manner that is hostile to religion in general and to *Wide Awake*'s outspoken style of religion in particular. And it has distributed an entitlement on the basis of religion, thus pressuring students to choose secular activities over religious ones or to conform their religious activities to the University's preferred mode.

The judgment should be reversed and the case remanded for entry of an order granting the petitioner students' motion for summary judgment.

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APPENDIX

STATEMENTS OF INTEREST

The Christian Legal Society, founded in 1961, is a nonprofit ecumenical professional association of 4,700 Christian attorneys, judges, law students and law professors with chapters in every state and at 85 law schools. Since 1975, the Society's legal advocacy and information arm, the Center for Law and Religious Freedom, has advocated the protection of religious speech and exercise in this Court and in state and federal courts throughout the nation.

Using a network of volunteer attorneys and law professors, the Center provides accurate information to the general public and the political branches regarding the law pertaining to religious exercise. In addition, the CLS Center has filed briefs *amici curiae* on behalf of many religious denominations and civil liberties groups in virtually every case before the U.S. Supreme Court involving church-state relations since 1980. These include *Widmar v. Vincent*, 454 U.S. 263 (1981); *Board of Educ. v. Mergens*, 496 U.S. 226 (1990); *Lamb's Chapel v. Center Moriches Union Free School Dist.*, 113 S. Ct. 2142 (1993); and *Zobrest v. Catalina Foothills School Dist.*, 113 S. Ct. 2462 (1993).

The Society is committed to religious liberty because the founding instrument of this nation acknowledges as a "self-evident truth" that all persons are divinely endowed with rights that no government may abridge nor any citizen waive. Declaration of Independence (1776). Among such inalienable rights are those enumerated in (but not conferred by) the First Amendment, the

first and foremost of which is religious liberty. The right sought to be upheld here inheres in all persons by virtue of its endowment by the Creator, Who is acknowledged in the Declaration. It is also a "constitutional right," but only in the sense that it is recognized in and protected by the U.S. Constitution. Because the source of religious liberty, according to our nation's charter, is the Creator, not a constitutional amendment, statute or executive order, it is not merely one of many policy interests to be weighed against others by any of the several branches of state or federal government. Rather, it is foundational to the framers' notion of human freedom. The State has no higher duty than to protect inviolate its full and free exercise. Hence, the unequivocal and non-negotiable prohibition attached to this our First Freedom is "Congress shall make no law. . . . "

The CLS Center's national membership, two decades of experience, and professional resources enable it to speak with authority upon religious expression.

The Southern Baptist Convention (SBC) is the nation's largest Protestant denomination, with over 15.4 million members in over 38,400 local churches. The Christian Life Commission (CLC) is the public policy and religious liberty agency for the SBC. Southern Baptists have expressed themselves in resolutions adopted in national conventions over the years, regarding the primacy of the principle of religious liberty, as contained in the Religion Clause of the First Amendment. CLC frequently files briefs as *amicus curiae* in important religious liberty cases, such as this case.

Family Research Council (FRC) conducts research and policy analysis in support of traditional Judeo-Christian values in American society. Through its publications and lobbying efforts, and through its close collaboration with such organizations as Dr. James Dobson's Focus on the Family, FRC seeks to vindicate the rights of Christians to participate as full and equal citizens in the public life of the nation.

Home School Legal Defense Association (HSLDA) provides legal defense for its 45,000 member-families nationwide that are home schooling their children. Frequently, HSLDA defends these homeschool families by asserting their constitutional rights to free exercise of religion. HSLDA is a non-profit association dedicated to preserving the fundamental right of parents to remain morally and constitutionally free to choose the academic environment in which they wish their children to be educated. HSLDA was formed in 1983 and is currently headquartered in Paeonian Springs, Virginia, in the greater Washington, D.C. area.

The National Association of Evangelicals (NAE) is a non-profit association of evangelical Christian denominations, churches, organizations, institutions and individuals that includes more than 50,000 churches from 74 denominations and serves a constituency of approximately 20 million people. NAE is committed to defending religious freedom as a precious gift of God and a vital component of the American heritage.